

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Criminal Action
v.)	No. 09-10017-GAO
)	
TAREK MEHANNA,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

TRANSCRIPT OF MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, August 3, 2011
2:04 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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20
21
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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 2:04 p.m.)

THE CLERK: United States District Court for the District of Massachusetts. Court is now in session. Please be seated.

For a motion hearing in the case of United States of America versus Tarek Mehanna, 09-10017. Would counsel identify yourselves for the record.

MR. CHAKRAVARTY: Good afternoon, your Honor. For the government, assistant U.S. attorneys Alope Chakravarty and Jeffrey Auerhahn, and counter-terrorism section trial attorney Jeffrey Groharing.

MR. CARNEY: Good afternoon, your Honor. J.W. Carney representing Tarek Mehanna, and with me is co-counsel Janice Bassil.

THE COURT: Good afternoon, everyone.

We have a number of pending motions brought by the defense. Let me address first the motions related to -- I think there are two. Maybe they're two combined in one -- related to the FISA search products. The statute provides that when there's a certification by the attorney general of the United States supported by -- well, with supporting materials submitted, that the Court is at least in the first instance to conduct an in-camera ex-parte review of those materials

1 containing classified information.

2 There has been a certification by Attorney General
3 Holder in this case filed, and materials have been submitted
4 under seal that are classified. I am in the process of
5 reviewing those materials. I have begun it, but because of my
6 trial schedule have not completed it yet. I don't think
7 there's -- it's appropriate to address those motions at this
8 point until I've completed that review.

9 So while that had originally been my intention, I
00:04 10 think we have to take that off the table for this hearing. I
11 expect that to be done soon, but I don't think it's -- because,
12 frankly, one outcome may be when I've completed the review is
13 that there will be no hearing, and if there is a hearing, it
14 will be on various conditions that will have to be established
15 as a consequence of the review. So it's premature, I think, to
16 do. I think setting the date has nonetheless had the
17 constructive effect of getting it all submitted and even soon
18 to be finished of the review.

19 So let me turn to the other motions --

00:04 20 MR. CARNEY: Is there any way the Court would benefit
21 from just some general comments by me?

22 THE COURT: I don't think so. I mean, I think the
23 general law is fairly anodyne, frankly, and the briefing is
24 attentive and thorough. And I don't think that a general
25 commentary on the FISA scheme would be particularly helpful.

1 MR. CARNEY: All right, your Honor.

2 THE COURT: I think maybe we could address the other
3 issues in the order in which they were filed, which was -- so
4 that would bring up the motion addressed, I think, to Counts 1
5 and 3 raising First Amendment arguments. Let me just say
6 before I hear you with respect to that -- let me just explain
7 why I denied the motion by the American Civil Liberties Union
8 of Massachusetts to file an amicus brief.

9 The denial was not made on substantive -- for
00:06 10 substantive reasons but procedural reasons. Amicus submissions
11 are a rather common occurrence at appellate levels, but
12 they're -- in my experience, anyway -- very rare at a trial
13 level, and I think particularly rare, if they have ever
14 occurred, in the process of an ongoing criminal prosecution.

15 The defendant here is ably represented by counsel who
16 have filed a very sophisticated First Amendment argument.
17 There's no reason to look to supplement that argument on
18 grounds of fairness to the defendant or any such matter. And
19 so I think there's no reason specific to this case why briefing
00:06 20 from nonparties would be particularly helpful or advance any
21 important interest that are not already well represented.

22 This is more or less parenthetical, I guess, but it
23 explains the reasoning behind my decision. It may be that in
24 many criminal prosecutions there are persons who are not
25 parties who would like to weigh in on an issue that exists in

1 the prosecution. If that were to happen on the defense side,
2 you'd have to consider whether or not to happen on the
3 government's side as well. And I think opening that door would
4 allow the potential for a very unusual alteration of the
5 customary and time-proven procedures that apply to criminal
6 trials, and I think with a danger of some distraction from the
7 main events and no necessarily valuable addition to the
8 process.

9 So I think this is -- this is not directed to this
00:08 10 case or this issue particularly. I just think an amicus brief
11 in a criminal prosecution should not be filed. Maybe there
12 would be a case someday years from now in the future when this
13 arises again that I would reconsider that. I just don't think
14 it's an important procedural approach. So that's -- it has
15 nothing to do with the merits of the argument.

16 All right. Then if you want to turn to that motion,
17 Mr. Carney.

18 MR. CARNEY: I do, your Honor. Thank you very much.

19 In focusing on the counts related to Section 2339A and
00:08 20 B, we're focusing on the law that prohibits a person from
21 providing material support to a foreign terrorist organization.
22 The statute precludes various services including financial
23 documents or financial services, lodging, training, expert
24 assistance, safe houses, false documentation, communications
25 equipment, legal substances, explosives, personnel,

1 transportation and things related to that.

2 Now, that doesn't mean that everything a person does
3 that could provide in any way some assistance to an FTO comes
4 within the statute. The leading case of *Holder versus*
5 *Humanitarian Law Project* makes it clear, explicitly clear, that
6 a person can have an association with a so-called terrorist
7 organization. He can be explicitly a member of a terrorist
8 organization. In other words, the United States Supreme Court
9 explicitly said that a person who is a citizen of the United
00:10 10 States can be a member of al-Qaida. The person can also
11 advocate in favor of the goals of an alleged terrorist
12 organization provided that this advocacy is independent of the
13 organization.

14 What the United States Supreme Court stated in *Holder*
15 is that in order for this statute, or these statutes, to
16 comport with the First Amendment, then a person must be free to
17 say anything he wishes on an important topic, especially on a
18 political topic, but he cannot provide any of the services
19 reflected in the statute if he is doing so either at the
00:11 20 direction of the terrorist organization or in coordination with
21 the terrorist organization.

22 When the Court focuses on the indictment and on the
23 first three counts, there are a number of allegations that we
24 are not challenging by this motion. They are reflected in
25 footnote 1 on page 2 of our motion; for example, allegations

1 that the codefendant traveled to Pakistan, that the codefendant
2 traveled to California, that the codefendant gave money to
3 someone, that the codefendant entered Iraq, that the
4 codefendant and the defendant allegedly traveled to Yemen, and
5 that the defendant allegedly gave false information. None of
6 that is the focus of this motion.

7 Beginning on the top of page 3 and carrying over to
8 page 4 are the overt acts that we say cannot be the basis for
9 providing material support in this case. Some of these acts,
00:12 10 as enumerated beginning on the top of page 3, are that
11 Mr. Mehanna watched jihadi videos with friends. The indictment
12 says he lent compact disks to people in the Boston area to,
13 quote, create like-minded youth; he discussed with friends
14 their view of suicide bombings, the killing of civilians and
15 dying on the battlefield for Allah; he translated texts that
16 were and remain freely available on the Internet; he looked for
17 information online about the 19 9/11 hijackers; he asked a
18 friend for information on how to transfer files from one
19 computer to another; and finally, he asked the codefendant how
00:13 20 to shield his identity when he is putting translations on the
21 public website.

22 All of these activities, I submit, are protected by
23 the First Amendment and cannot be the basis for a material
24 support indictment, and so we are asking the Court to strike
25 them from the indictment or rule that they cannot be evidence

1 that constitutes overt acts in support of the indictment.

2 Let me address two issues briefly: *Holder* says that a
3 defendant or a citizen of the United States can say anything he
4 wishes on any political topic. Our client does not dispute
5 that he tried to persuade people of his views. Mr. Mehanna
6 believes that United States soldiers should not be in a Muslim
7 country killing Muslims who are in that country. He believes
8 that. I can recall many people 40 years ago who believed that
9 U.S. soldiers should not be in the Republic of Vietnam killing
00:14 10 citizens of that country. That's directly comparable to the
11 beliefs that Mr. Mehanna holds. I submit that this is core
12 political speech. This is advocating for, or against, a United
13 States policy and is entitled to the greatest protection
14 available under the First Amendment.

15 I'll speak about one area in particular because the
16 government has put so much emphasis on it, both in its
17 indictment and in its argument on bail to this Court and in its
18 written submissions, and that is, that Tarek Mehanna has
19 translated documents. All of the documents that he translated
00:15 20 were and remain freely available on the Internet. He is
21 translating them from Arabic to English.

22 If a United States citizen spoke Arabic, he or she
23 could freely go onto the Internet and read these documents.
24 The documents contain political views regarding the conflict in
25 Afghanistan or in Iraq, and the view of the people who believe

1 that the United States should not be in those countries and
2 that United States soldiers should not be killing Muslims in
3 those countries. And they would read the powerful, eloquent
4 statements by people in other parts of this planet who support
5 that. That's what he translated.

6 What the United States is trying to do in this case,
7 your Honor, is control the speech that is available to United
8 States citizens on the Internet. If a person could read it in
9 Arabic, there's no problem, but if Tarek Mehanna translates it
00:16 10 into English, then he finds himself indicted for providing
11 material support to a foreign terrorist organization. By the
12 United States' efforts to control the ability of United States
13 citizens to read the views of other people around the world is
14 engaging in the type of censorship that is directly comparable
15 to what China is trying to do to the Internet.

16 China, it's well reported, is trying to prevent
17 Chinese citizens from reading items on the Internet that
18 perhaps were prepared in the United States. The secretary of
19 state has blasted Chinese authorities repeatedly, as has the
00:16 20 president himself, because of this effort to control speech, to
21 sensor speech. I respectfully submit that is exactly what the
22 United States is doing. They don't want citizens in the United
23 States to read these publications, and they are hoping that
24 because the citizens don't speak Arabic they will not be able
25 to do so. These documents are purely political and cannot be

1 the basis of this criminal case.

2 *Snyder*, which was cited in my brief, gave instances of
3 speech that is incredibly offensive that arouses contempt, as
4 Chief Justice Roberts put it. These were people who were
5 carrying signs outside the funerals of United States soldiers.
6 The signs read, "Thank God for 9/11"; "Thank God for IEDs";
7 "Thank God for dead United States soldiers." The United States
8 Supreme Court said that as offensive or upsetting as these
9 statements are, a person is entitled to say them.

00:18 10 What Tarek Mehanna put in his publications, whether on
11 a blog, whether translating a document, whether making a
12 comment to friends, whether advocating for a position, it is
13 the core political speech protected by the First Amendment, and
14 I would ask the Court to repudiate the United States' effort to
15 suppress political speech protected by the First Amendment.
16 We're asking that these allegations either be stricken from the
17 indictment, or the Court rule that they cannot be the basis for
18 the government to proceed against him under those first three
19 indictments.

00:18 20 Thank you.

21 THE COURT: Mr. Chakravarty?

22 MR. CHAKRAVARTY: Thank you. Your Honor, as a
23 procedural matter, the motion to dismiss the count charged in
24 the indictment, your Honor knows the standard view is accepting
25 the facts as they appear in the indictment and the inferences

1 that can be drawn therefrom in order to determine whether as a
2 matter of law the case can proceed. And I submit at this stage
3 nothing the defense has said changes the proper frame of
4 reference which is the indictment states a valid claim that the
5 defendant unlawfully and knowingly conspired to and, in Counts
6 2 and 3, attempted to provide and provided material support to
7 terrorists and to a designated foreign terrorist organization.

8 That is what the defendant is charged with, a crime
9 under federal law, not for the substance of what he believes;
00:19 10 not for his political descent; not for perhaps his motivations
11 for why he chose to unlawfully and knowingly provide support to
12 an entity and individuals who are actually acting against U.S.
13 interests. But that provision of support is what is being
14 criminalized, the conspiracy to provide that support, not the
15 motivations for why he provided that support, which I think
16 goes to counsel's argument as to his political expressions.

17 And it's through that frame of reference that there
18 was a crime committed here. The crime involved a conspiracy,
19 and the defendant used each of these instances of speech acts,
00:20 20 verbal conduct to demonstrate the existence of the conspiracy.
21 That is what an overt act is, an act in furtherance of the
22 conspiracy. It helps a jury, it helps the Court understand the
23 circumstantial evidence, what the nature of the agreement was
24 that was criminal.

25 And it's ultimately for the jury to decide whether

1 each of those acts, and the others that will be presented at
2 trial that are not delineated in the indictment -- whether
3 those sufficiently provide the jury with enough information to
4 determine whether, in fact, this was, as the defendant argues,
5 purely an independent expression of advocacy for the objectives
6 of al-Qaida and other terrorists, or whether he wanted to help
7 them.

8 And it was his state of mind, his understanding that
9 by doing things like translating documents, making them
00:21 10 available, making them accessible to American-born youth who
11 may not know Arabic, by being able to have them make an impact,
12 whether that was actually going to provide assistance to the
13 organization that he idolized and he revered, that ultimately
14 is a jury question. That's a question which we may deal with
15 at a Rule 29. But at this stage your Honor, as a matter of
16 law, simply needs to determine whether a defendant can violate
17 the terms of conspiracy to violate 2339A and 2339B, or the
18 substantive charge of 2339A, on the basis of expressive
19 conduct. And if that is the question at this stage, then
00:22 20 *Holder* definitively answers that question.

21 In *Holder*, as your Honor knows, the advocacy could not
22 be more classic advocacy, representation before international
23 bodies, provision of assistance in terms of educating an
24 organization how to better represent themselves. That was
25 advocacy. Attempting to go to Pakistan to join a terrorist

1 training camp, hoping to go to Afghanistan to join terrorists
2 who are actively involved against American troops, going to
3 Yemen to get terrorist training, hoping to go on to Iraq to
4 help fight American soldiers who were actively engaged there,
5 providing translation assistance to people on the Internet who
6 were producing mass propaganda and al-Qaida media full with the
7 al-Qaida label emblazoned on the media itself, these are types
8 of activities which are something very definitively other than
9 advocacy.

00:23 10 These were attempts for the defendant and his
11 coconspirators to actually join the fight, to actually provide
12 assistance in any way they could either through their own
13 personal -- them, themselves, as personnel, through others that
14 they knew who they could help recruit, or through the services,
15 expert advice and assistance or training that they were trying
16 to provide to would-be al-Qaida recruits, would-be terrorists
17 who could go and do what they were unsuccessful in doing.
18 Those are the reasons why these overt acts are germane to
19 characterizing what the conspiracy was about, about what the
00:23 20 illegal agreement was.

21 Through that lens it becomes clear that if you're
22 engaging in speech in order to commit a crime, whether it's to
23 hand a bank teller a note saying "I'm robbing the bank" or
24 whether it's lying to the FBI or whether it's to commit a
25 conspiracy to provide material support to terrorists is not

1 protected speech. The Constitution is not a suicide pact, and
2 you are not allowed to commit a crime through your verbal
3 conduct if that conduct constitutes a crime.

4 So this red herring about *Brandenburg* and *Snyder* and
5 the other cases which talk about perfectly innocent conduct
6 being prosecuted because the government just doesn't like it is
7 simply in apposite in this scenario. If there were no
8 conspiracy to provide material support to terrorists and to the
9 FTO charges, then perhaps we would have a different posture.

00:24 10 But when the defendant engaged in this conduct he had a
11 purpose, his coconspirators had a purpose, and he wanted to see
12 that come to fruition. And that was ultimately to provide
13 support to these terrorist organizations. That's the criminal
14 conduct that's at issue here. And I think it's hardly
15 debatable that engaging in speech to perpetrate a crime is not
16 protected conduct and the First Amendment analysis doesn't
17 apply at all. We need not go do the strict constitutional
18 scrutiny analysis that the *Holder versus Humanitarian Law*
19 *Project* court did.

00:25 20 But even if we had to go that far, even if the Court
21 had lingering concerns as to whether the particular type of
22 conduct, the particular type of speech that the defendant
23 engaged in, which the government would argue here was not
24 advocacy, there was never a representation that's charged in
25 the indictment that the defendant was going to represent the

1 interest of al-Qaida and an international forum or some other
2 peaceable solution. And I would suggest that the charging of
3 the 2339A charge, which specifically has a scienter requirement
4 that the defendant knew the services that he was providing, or
5 conspired and agreed that the services that he would be
6 providing would be provided for a crime of terrorism, not just
7 for a peaceable purpose, as was the case in *Humanitarian Law*
8 *Project*, that that scienter requirement as indictment as
9 expected to be proved at trial clearly would overcome even the
00:26 10 limited facts of *Holder versus Humanitarian Law Project*.

11 But if the Court were to engage in a strict
12 constitutional scrutiny analysis under *Humanitarian Law*
13 *Project*, then what the court made clear in that case was that
14 the compelling state interest here no less than national
15 security is sufficiently compelling that the designation of a
16 foreign terrorist organization and the prohibition of providing
17 any type of support, including advocacy to that organization,
18 was narrowly tailored to that state interest.

19 So through that constitutional lens, even if the Court
00:26 20 were not to agree that engaging in verbal acts could constitute
21 violation of the statute -- could independently constitute
22 crimes, keeping in mind that, of course, overt acts need not be
23 criminal at all, in this case the government is now arguing
24 that they were criminal but for the fact that they were in the
25 course of a conspiracy to provide material support to

1 terrorists.

2 But through that lens the defendant's conduct clearly
3 would pass the strict constitutional scrutiny that providing
4 support to a designated terrorist organization through the
5 means that are alleged in the indictment is something that
6 Congress specifically prohibited, and along with the executive
7 when the power of that -- the elimination is at its zenith was
8 not appropriate for the Court to invade.

9 So consequently, even if the Court were to engage in
00:27 10 that constitutional analysis, and as I suggest and say in the
11 papers perhaps not at this stage but down the road that the
12 Court should find that the case should be submitted to the jury
13 and a valid conviction could stand if all that existed in this
14 case were speech-related conduct. But as the defendant
15 concedes, that's not all we have in this case.

16 And the defendant characterizes some of the physical
17 acts that the defendant and his coconspirators engaged in, as
18 described in the indictment. But simply having one of those
19 means that this motion has to be fatally flawed because if the
00:28 20 First Amendment is not implicated in conduct that would give
21 rise to satisfying the elements of the offense, then this
22 motion must fail at this stage.

23 To the extent that this issue comes up at trial when
24 there is a full record and there are specific facts that have
25 been presented to the Court related to whether a certain aspect

1 of the *Holder* finding such as whether the defendant's conduct
2 was done sufficiently coordinated with al-Qaida in the case of
3 the 2339B charge, then that is a case -- that is a situation
4 that we should address at that juncture.

5 I'd submit to you that *Holder* makes clear that the
6 defendant's intent and his understanding is what is operative,
7 especially in a conspiracy case where sometimes that's all that
8 there is. And his intent and his understanding and providing
9 the very dangerous services which to this day are being
00:29 10 consumed by people around the world, that that was provision of
11 material support under several of the delimited ways that the
12 statute provides for including, just to clarify, property;
13 services; training; money, which includes currency and monetary
14 instruments; expert advice assistance and personnel, all of
15 which are properly alleged in the indictment.

16 Consequently, the motion should fail, your Honor.

17 THE COURT: Reply? No.

18 MR. CARNEY: Your Honor, thank you. Unless you have
19 questions.

00:29 20 THE COURT: I do. Would you respond to the argument
21 that Mr. Chakravarty made a little bit ago -- well, I guess he
22 returned to it in the end, that the matter is really more
23 appropriately considered, at least in the first instance, a
24 Rule 29 occasion at the close of the government's case.

25 MR. CARNEY: The remark is not without some weight.

1 And we thought about how to handle this before the Court. This
2 is how we concluded the motion to dismiss was the most
3 appropriate vehicle to bring before your Honor: If this
4 indictment only contained the allegations that we say are
5 protected speech, then I believe a motion to dismiss could be
6 brought and our exact argument could be made, and in the
7 absence of any other allegations, if the Court concluded that
8 all of the overt acts were protected by the First Amendment,
9 then it would be appropriate at this stage to dismiss the
00:30 10 indictment, I would submit. It would be as if an indictment
11 were based on the fact that a defendant walked on a sidewalk
12 across the street from this courthouse and said, "I think
13 President Obama is wrong and Osama bin Laden was right." And
14 that's the only thing alleged that the defendant did. It was
15 the basis for an indictment before this Court. We would move
16 to dismiss, and I submit the Court would most likely grant that
17 motion.

18 If you've got an indictment that has properly alleged
19 overt acts and improperly alleged overt acts because they're
00:31 20 protected by the First Amendment, is there a way to alert the
21 Court that the second category should not be allowed to remain
22 in the indictment or should be dismissed? We thought a motion
23 to dismiss would be the proper way to do it. I concede that
24 there are other ways and the Court would have other
25 opportunities to address this motion, but it was important

1 enough to bring it to your attention.

2 THE COURT: With respect to overt acts, is it your
3 position that an act of speech that is, let's say,
4 unquestionably protected under the First Amendment cannot be an
5 overt act?

6 MR. CARNEY: Yes, that is my position.

7 THE COURT: How is that different from other innocent
8 overt acts?

9 MR. CARNEY: I don't understand the question.

00:32 10 THE COURT: Well, if innocent acts can be overt acts
11 in support of the proof of a conspiracy, assuming other
12 adequate proof of the conspiracy -- buying a map, for example,
13 before you execute a bank robbery -- why couldn't an innocent
14 act that is innocent because of the First Amendment protection
15 similarly serve as not a basis by itself for conviction but as
16 an overt act that satisfies that element of the conspiracy
17 charge?

18 MR. CARNEY: Certainly there are a number of acts
19 alleged in many indictments that are connected by the
00:33 20 government to their indictment. I'm not sure I would agree
21 that buying a mask --

22 THE COURT: Map.

23 MR. CARNEY: Oh, map.

24 THE COURT: Mask is dicier. I agree.

25 MR. CARNEY: Okay, gotcha.

1 THE COURT: Map.

2 MR. CARNEY: Map. Buying a map doesn't implicate a
3 First Amendment protection.

4 THE COURT: How about one conspirator tells the other
5 where the bank is located in speech?

6 MR. CARNEY: That's not the type of speech that would
7 be characterized as political speech commenting on an important
8 government policy. And I think that what makes this situation
9 different is every one of these actions pointed to by the
00:33 10 government that I've laid out and I repeated earlier to your
11 Honor is political speech. It's saying to his friend, "I think
12 you should watch this video. It's very powerful." It's saying
13 to the world that speaks English, "I think you should read this
14 document called '39 Ways.'" It's saying to someone who is
15 trolling on the Internet and comes across a video that "Here is
16 the translation so you know what is being said." It is when
17 the speech is protected by the First Amendment, especially the
18 core value of the First Amendment which is the discussion of
19 political speech, that it's not enough to say it can be an
00:34 20 innocent act.

21 In this case, unlike your Honor's example, the
22 government was not saying that buying a map constituted an act
23 that was the equivalent of the crime, it was an act done before
24 the crime. What they're saying and pointing to these things
25 are that each of them is independently a crime in and of

1 itself; in other words, in the armed robbery -- or bank robbery
2 case, if the only allegation that the government made were that
3 the defendant bought a map, well, that case is going nowhere.
4 But in this case if the only allegation in the indictment, the
5 only thing the government alleged were that -- excuse me a
6 moment, your Honor.

7 (Pause.)

8 MR. CARNEY: If the only thing that the government
9 alleged was that Tarek Mehanna translated texts that were and
00:35 10 remain freely available on the Internet, then under the
11 government's argument that allegation alone would be permitted
12 under this indictment. I disagree.

13 And so that where each and every one of these things
14 is contended to be an independent crime of providing material
15 support, that's what makes this different along with the First
16 Amendment from a situation where there's an allegation of
17 buying a map in a bank robbery case.

18 That's how I would distinguish it, your Honor.

19 THE COURT: Okay.

00:36 20 MR. CHAKRAVARTY: Just to clarify so there's no
21 misapprehension, the government is not alleging that each overt
22 act would independently constitute a crime. The overt acts, in
23 fact, as your Honor may know, the 2339A and B statutes do not
24 require, unlike a 371 conspiracy, an overt act at all. These
25 overt acts are listed for a variety of reasons. Some of them

1 are the vehicles through which the defense -- the defendant is
2 alleged to have tried to provide material support to al-Qaida
3 and to other terrorists.

4 But taking for a moment the defendant's hypothetical
5 that if the only allegation -- only listed overt act in a
6 criminal charge for conspiracy to provide material support,
7 which again is the appropriate lens, the crime is providing
8 material support or conspiring to provide material support.
9 And if the only act that the defendant took in order to further
00:37 10 that objective was to do translation for the purpose of
11 providing material support, then *Holder* has responded to this
12 question and it says that that is illegal, your Honor.

13 THE COURT: Okay. Well, I think the matter is
14 premature. I'm going to deny the motion without prejudice to
15 the merits of the arguments being raised for an appropriate
16 time at trial, that probably being a Rule 29 motion, or very
17 likely being, or perhaps we'll have arguments over the
18 admission of evidence. I'm not sure. But I think as a
19 pretrial matter it's premature.

00:38 20 The next, I think, is the materiality issue with
21 respect to the false statements.

22 MR. CARNEY: Yes, your Honor.

23 THE COURT: I think.

24 MR. CARNEY: I will focus my oral argument on Count 6
25 and rest on my written submission regarding Count 7.

1 THE COURT: All right.

2 MR. CARNEY: Count 6 alleges a false statement in
3 regard to Daniel Maldonado. If I may briefly rehearse the
4 facts.

5 On December 12, 2006, the government has asserted that
6 my client received a telephone call from Daniel Maldonado.
7 That telephone call was recorded by the government. Four days
8 later an FBI agent approached my client and asked him three
9 questions: When did you last speak to Daniel Maldonado? Where
00:39 10 was he located? And what was he doing? My client responded,
11 according to the FBI, that he last spoke to Mr. Maldonado
12 approximately two weeks earlier, that Mr. Maldonado had been in
13 Egypt, and that Mr. Maldonado was working on a website. The
14 government alleges that these were false statements.

15 Conceding for the purposes of argument only that they
16 were false statements, the critical issue before the Court is
17 were these false statements material. When Congress enacted
18 1001, the false statements statute, it was greatly concerned
19 that it could be abused by federal agents. Some commentaries
00:39 20 even called it the potential for a, quote, gotcha crime, which
21 I would spell G-O-T-C-H-A. And what they meant by that is they
22 did not want the FBI going up to people and asking them a
23 question that could elicit a false answer and bring the person
24 before this Court on a false statement charge.

25 And so focusing on the materiality, the U.S. Supreme

1 Court has made it clear that for a statement made to an FBI
2 agent, even a false statement to be a crime, it must be
3 material to an investigation. And the materiality term is
4 defined as a statement that has a natural tendency to influence
5 or is capable of influencing the decision of a decision-making
6 body to which it was addressed.

7 Now, that's kind of an odd definition, but it reflects
8 the fact that when this statute was created it was clear from
9 the intent of the Congress that it was meant to apply to
00:41 10 someone who approached the government, often for a benefit, and
11 made a false statement. For example, if you wanted to apply
12 for a Social Security benefit and you did so and lied to the
13 person taking the application about what your age was, what
14 your income was, what your personal situation might have been,
15 then you would be prosecuted for doing that. It's been
16 extended to other contexts but the focus remains: Was the
17 false statement material to an investigation that the
18 government was doing? So let's revisit the question: Where is
19 Daniel Maldonado? So the government, by this question, is
00:42 20 interested in knowing where is Daniel Maldonado. And
21 presumably, that is the investigation.

22 Well, the FBI and the government knew exactly where
23 Daniel Maldonado was on December 12th, 2006. We've made this
24 assertion many times, and the government has never denied it.
25 They knew with 100 percent certainty that Daniel Maldonado was

1 in Somalia. There was absolutely no possibility that what
2 Mr. Mehanna said to an FBI agent about where Daniel Maldonado
3 was would in any way affect the investigation of where Daniel
4 Maldonado was because they knew where he was. They not only
5 knew where he was, they were recording the telephone call
6 between Maldonado and the defendant.

7 If a false statement cannot possibly influence an
8 investigation, as is the case here, then it is not material.
9 If a federal agent asked me in this courtroom, "Where's Al
00:43 10 Chakravarty?" and I said, "Oh, he's over at the Barking Crab
11 having a cocktail," and that agent is looking over at this
12 table, no matter what comes out of my mouth it's not going to
13 change his knowledge that Attorney Chakravarty is sitting at
14 that table right there. That's the same situation we have
15 here.

16 I mentioned that the statute is not meant to be a
17 gotcha crime. My client was interviewed for a significant
18 amount of time by the FBI that afternoon. It was only at the
19 end of their conversation in what I would call a Columbo moment
00:43 20 where, as the agent is walking away, he turns back and says,
21 "Oh, I have one other question. Do you know where Danny
22 Maldonado might be?" in order to try to get a false statement
23 from the defendant and thereby be able to put pressure on him
24 to become a cooperating witness by threatening him with a
25 charge of making a false statement.

1 That's not what this statute was designed to do. And
2 in order to manufacture a crime in this instance, the FBI had
3 to engage in that kind of gotcha approach, the same way they
4 would have if they walked up to someone and said, "Hey, was
5 I" -- "did I see you with your best friend's wife at the
6 Holiday Inn last night?" The person says, "No, that's not me."
7 "Okay. Well, we have a photo of you and her. Here it is.
8 Okay. You've just made a false statement to the FBI. Now we
9 want you to be a cooperating witness against your corporation
00:45 10 and surreptitiously record what's said at the next board
11 meeting." That's a gotcha. This is a gotcha. The answer
12 could not have been material to the investigation of where is
13 Daniel Maldonado and, therefore, this indictment should be
14 dismissed.

15 Thank you, your Honor.

16 THE COURT: Mr. Auerhahn?

17 MR. AUERHAHN: Thank you, your Honor.

18 Very briefly, with all due respect to Mr. Carney, he
19 talks about a statute which isn't, in fact, the way it's been
00:45 20 enforced, the way it's been interpreted. He also, again, with
21 all due respect, does not give the accurate description or
22 definition of materiality. It's not that it actually
23 influenced the course of an investigation, but it is the kind
24 of information that the FBI conducting an investigation would
25 rely on in the course of an investigation and is capable of

1 influencing. It's clear from a number of the cases that we've
2 cited, a couple that are on all fours of this, where the FBI
3 knew the true story when they came to interview someone, and
4 numerous cases have held that it's not the fact that the FBI
5 knew the information was inaccurate, does not affect
6 materiality because looking at it from the point of view of the
7 person making the statement, is he providing information that
8 is capable of influencing, and we're not looking at actually in
9 this particular case did it influence. And even the First
00:46 10 Circuit in the case in where this decision had already been
11 made with reference to benefits so the false application
12 submitted by the individual obviously in that particular case
13 could not have influenced, nevertheless, it was a false
14 statement we're looking at from the point of view of the person
15 making the statement.

16 And, you know, you have a case here where the
17 defendant clearly knew that what he said was a crime. There
18 was no ambiguity in his mind. I attached an exhibit where he
19 talks about the fact that I know I lied to the FBI and
00:47 20 essentially I know it's a crime.

21 But even if we were to look at it from the point of
22 view of the FBI, which I suggest we don't have to, if he had
23 told the truth, then it would have affected the course of the
24 investigation. They would have asked follow-up questions.
25 Yes, I know he's in Somalia. "Well, do you know who he is

1 with?" The defendant did know who he was with. He knew he was
2 with Omar Hammami. "Did you speak with him before he went to
3 Somalia? Did you know that he was going?" "Yes, I did. I met
4 him in Egypt with Mr. Hammami," and they talked about going to
5 Somalia.

6 So the evidence that we'll be presenting at trial is
7 that it did, in fact, affect the investigation. But again, for
8 the purpose of the motion -- I'm not sure that this is, as with
9 the other case, appropriate for a motion to dismiss. But even
00:47 10 if it were, we look at it from the point of view of the kind of
11 information that the FBI is seeking when they're conducting an
12 investigation: Mr. Maldonado was in Somalia; he was receiving
13 training from al-Qaida; he was involved in fighting. The
14 defendant knew some of that, he may not have known all of that,
15 and ultimately, Mr. Maldonado pled guilty to receiving military
16 training from al-Qaida, clearly a matter within the
17 jurisdiction and investigation of the FBI. And his answers
18 were the kind of information the FBI was seeking and is the
19 kind that they normally rely on in the course of their
00:48 20 investigation.

21 Again, I'm focusing just on what Mr. Carney focused on
22 in his argument. For the rest of it, I just rely on the
23 submissions.

24 THE COURT: Okay. Well, again, this motion is also
25 denied. Mr. Carney proposes an interesting and perhaps even

1 appealing definition of materiality. It's not the ones that
2 the courts have adopted, and that's the short answer. The law,
3 unfortunately, is against him on this. It's sufficient to at
4 least withstand a motion to dismiss. Ultimately, the question
5 of materiality will be one for the jury to decide. So all
6 right. That motion is also denied.

7 That brings us to the motion for exculpatory evidence.
8 Ms. Bassil? No? You wrote it, why is he arguing it?

9 MS. BASSIL: Why not?

00:49 10 THE COURT: Go ahead.

11 MR. CARNEY: All right, your Honor. In the past we've
12 brought broad-based motions for exculpatory evidence. In this
13 one we have targeted five specific areas that we are interested
14 in. This is Document 188.

15 THE COURT: Right.

16 MR. CARNEY: I'm informed by the government that
17 exculpatory -- potentially exculpatory evidence sought by
18 Number 1 may be arriving next week. I will withhold argument
19 on Number 1 and revisit it with the Court at a later date if
00:49 20 it's necessary, but I know that this type of material is very
21 important as exculpatory evidence under Category No. 1. Two
22 and 3 --

23 THE COURT: Let me just ask -- I note that there has
24 been a lot of discovery, and a lot of it has been as a result
25 of seizures, intercepts, and so on. This addresses

1 particularly -- well, agent notes, I guess, 302s and so on.
2 Have there been any 302s disclosed yet?

3 MR. CARNEY: They began being disclosed last week,
4 your Honor.

5 THE COURT: Okay. What's the --

6 MR. CARNEY: As well as grand jury transcripts. So --

7 THE COURT: In what volume? Maybe I should ask the
8 government: What's the volume anticipated for 302s and grand
9 jury...

00:50 10 MR. CHAKRAVARTY: So we have produced the main
11 cooperating witnesses, the 302s which reflect their initial
12 proffer with the government, as well as grand jury minutes. We
13 expect more of those in the order of a handful, including
14 there's actually a DVD which I'll hand to counsel at the end of
15 this hearing, along those lines. In total, and in deference to
16 counsel in terms of what to expect in terms of these materials,
17 which the government does not concede are *Brady* material but
18 they are *Jencks* or they are otherwise things that we intend to
19 produce, *Giglio*, we expect somewhere on the order of 100-plus
00:51 20 302s to be produced, most of which are related to chain of
21 custody, seizing agents' recording of memorialization of some
22 kind of evidence. In terms of substantive actual witness
23 interviews, actually, civilian witness interviews, I expect
24 less than 20 more, and those --

25 THE COURT: Twenty more, is that what you said?

1 MR. CHAKRAVARTY: Twenty more, yes. We've probably
2 given maybe ten now.

3 THE COURT: Okay.

4 MR. CARNEY: May I return to the motion?

5 THE COURT: Yes. Yes.

6 MR. CARNEY: We have asked the government if they did
7 two things in particular: First, did they try to determine if
8 there had been any direct communication between our client and
9 al-Qaida. We submit that if they did that specific
00:52 10 investigation to determine if any member of al-Qaida or
11 representative of al-Qaida had a communication with our client
12 and they turned up a negative result, we would like to know
13 that fact.

14 It can't be gainsaid that if they did investigate that
15 and there were conversations between a member of al-Qaida and
16 our client, that would become the centerpiece of their case.
17 The fact that they looked for it and didn't find it, especially
18 given the resources that they have to do this kind of search
19 that we have no ability to do, the ability for the NSA or the
00:53 20 CIA or the FBI or other agencies that maybe none of us even
21 know about, and they can conduct these investigations, and if
22 they did such an investigation and it came up negative, I
23 submit that's exculpatory and we should find out about it.

24 In a similar vein, the government has alleged that our
25 client in 2004 went to Yemen to train at a military camp. Our

1 client has asserted that he went to Yemen to study at a
2 religious school. We have asked the government if they have
3 searched in their databases to learn whether there was, in
4 fact, any military training camp in Yemen in 2004, and that if
5 that search produced a negative result, that we need to be told
6 about it.

7 I would compare it to this, your Honor: If the
8 defendant were accused to have gone to Vermont in order to ride
9 a giant Ferris wheel that was the tallest Ferris wheel in the
00:54 10 country, and the government did an investigation to corroborate
11 that and our client said, "I didn't go to Vermont to ride on a
12 Ferris wheel. I went to Vermont because I wanted to spend the
13 weekend at an inn," if the government did an investigation and
14 through all of its resources determined there isn't a single
15 Ferris wheel in Vermont, then I submit that would be supportive
16 of my client's assertion that he did not go to Vermont to ride
17 a nonexistent Ferris wheel but that he indeed went to spend
18 time at an inn.

19 So we have asked them: Did you use your resources to
00:55 20 look and see if there's any training camp in Yemen in 2004 that
21 the defendant could have gone to? They don't have to tell us
22 if they've looked, or if they did look, they found nothing. We
23 submit that's exculpatory and we should be told that.

24 Under Number 4, we have received information, albeit
25 at this point through the media, that our client was approached

1 by a counterterrorism agent or cooperating witness and asked to
2 engage in criminal terrorism conduct and that our client turned
3 the offer down. We're aware, according to media, that this
4 allegation has been confirmed by two sources who would have
5 firsthand knowledge of this within the counterterrorism agency.
6 We're told that a person representing that agency came to this
7 district to meet with the United States Attorney, who
8 apologized for having stepped on the investigation going on in
9 this district.

00:56 10 The critical point for us is that if someone came up
11 to Mr. Mehanna and suggested that he was supportive of
12 Mr. Mehanna's views and tried to get Mr. Mehanna to engage in
13 conduct that would be criminal and Mr. Mehanna said, "No, I'm
14 not going to do that," we submit that's exculpatory evidence.

15 In my discussions with a member of the prosecution
16 team I was told that he does not think this would be --

17 THE COURT: I'm sorry?

18 MR. CARNEY: He does not think that this would be
19 exculpatory evidence; and, therefore, it would not have to be
00:57 20 turned over. We disagree and we ask your Honor to make a
21 ruling.

22 Finally, your Honor, in Number 5, we have asked for
23 information that would verify that the government knew that
24 Daniel Maldonado was in Somalia on December 12th, 2006, whether
25 by a person who was present there, a person who was cooperating

1 or employed by the U.S. government who was there, even a person
2 who was standing right beside Mr. Maldonado when he was making
3 that telephone call, it was being recorded by the government.
4 We submit that this evidence would be exculpatory in our
5 argument that any false statements made by my client would not
6 be material.

7 The government has responded that they've already
8 notified us of the name of Omar Hammami. We are looking for
9 the other person's name and the other evidence the government
00:58 10 knew on December 16, 2006, that Danny Maldonado was in Somalia
11 and what he was doing.

12 Those are the five targeted areas of exculpatory
13 evidence we're seeking, if your Honor please.

14 MR. CHAKRAVARTY: Your Honor, with regard to the first
15 category that arose earlier, is that this is not classic *Brady*
16 or *Giglio* information, although to the extent this is obviously
17 information that the government intends to produce, we're in
18 the process of doing that. We will continue to produce that.
19 And I know the defense is not pressing that right now, but to
00:58 20 the extent that there was something that was impeaching of a
21 witness or something that was exculpatory in a witness
22 statement, then obviously any of that information will be
23 produced in those 302s and grand jury minutes.

24 In regards to the Requests 2 and 3 for these
25 descriptions of the government's investigative steps and then

1 whether a negative response was elicited from it, I think
2 there's a fundamental misunderstanding about how a government
3 conducts an investigation. The government does not in a
4 regular manner in cases say, "Let me go look for evidence of
5 communication between a defendant and al-Qaida or whoever
6 else"; instead, they say, "Let's look at the information that
7 is in the government's possession and determine what other
8 investigative steps we can take."

9 What that -- the reason I pose it in that sense is the
00:59 10 prospect that the government would specifically look for a
11 piece of information in order to be responsive to a discovery
12 request is pretty farfetched, but more to the point, what's
13 discoverable under *Brady* and *Giglio* is the information itself,
14 not whether the government has not found something that
15 otherwise you would expect to have.

16 This isn't a rape case or a murder case where DNA
17 evidence in a specific place at a specific time would
18 inherently be inculpatory or exculpatory and, if the government
19 chose not to engage in an investigative step, then that might
01:00 20 be able to be used to impeach government agents. This is not
21 that circumstance. This is simply a bootstrapped attempt to
22 scour the government's files and somehow elicit a response, a
23 negative response, presumably, that the government did not find
24 inculpatory evidence demonstrating that the defendant had some
25 contact with al-Qaida or whether there was a terrorist training

1 camp in Yemen.

2 And I'd suggest to your Honor those facts, whether
3 there was a terrorist training camp in Yemen and whether the
4 defendant had contact with a member of al-Qaida, each of those
5 facts are not exculpatory even if they were in the negative.

6 And I'd suggest that because as the indictment, as it's
7 charged, does not allege either of those facts, that the
8 defendant actually attended terrorist training in a Yemenis'
9 terrorist training camp; it's rather that it was the

01:01 10 defendant's intent -- it was the understanding of the purpose
11 of the 2004 trip going to Yemen was to obtain military-type
12 training.

13 Consequently, whether there was or there wasn't is
14 not -- it's not probative of an issue in the case, which we've
15 made clear to the defense. But more importantly, this is an
16 interrogatory in the classic sense. They're asking, "What did
17 you do? How did you go about your investigation? Because if
18 you didn't find evidence where you expected to find evidence,
19 that we're entitled to that."

01:02 20 But that's not how the rules of discovery work. If we
21 found inculpatory evidence, we're under no obligation to
22 produce that to the defense unless it's required by rule, but
23 certainly not under *Giglio* and *Brady*; and conversely, if there
24 was exculpatory evidence and there was evidence that
25 demonstrated that the defendant did not go for the purpose of

1 finding a terrorist training camp, then that would be
2 exculpatory.

3 But that's not what the request is for. The request
4 is for whether there was a terrorist training camp in Yemen,
5 which is not before the Court and it's not in the indictment.
6 Similarly, it's whether the defendant had any contact with an
7 al-Qaida representative, which is not before the Court. If the
8 government chose to introduce that evidence, it would be
9 inculpatory rather than exculpatory.

01:02 10 With regard to the fourth request -- sorry, I hasten
11 to add, the subject of the motion -- this isn't a request --
12 the information that the defense had made -- has made clear to
13 the Court is also relayed to counsel through a letter, so we
14 had the opportunity to respond in letter form to the defense.
15 But it is important for the Court to know that regardless of
16 the characterizations of what the prosecution team would think
17 is exculpatory or is not, that the premise of the defense
18 request for information related to an investigative attempt to
19 obtain inculpatory information from the defendant after his
01:03 20 indictment is inaccurate. The press reporting, the media
21 reporting, whatever it was that triggered that is incorrect
22 information.

23 We've looked into it. What's telling is that that's
24 the only substantiation for the request to the Court, whereas
25 the defendant himself would be best suited to know whether he

1 was asked to do something in pursuit of terrorism. And I would
2 suggest that it would be relatively easy to proffer to the
3 Court as a basis for this request such facts, and I'd submit to
4 you they can't do that because this misinformation which
5 entities in the media have propagated has led to a
6 misapprehension by the defense that the government possesses
7 some information that is discoverable or demonstrates that
8 there was an attempt to get inculpatory information from Tarek
9 Mehanna. Specifically, I would suggest that the request was
01:04 10 for information related to the New York Police Department
11 attempt to obtain inculpatory information from the defense, and
12 the short answer is: There is no such exculpatory information.

13 The final request related to information about who
14 else knew about who was near Daniel Maldonado during this phone
15 call. The government did mention, you know, now a few times --
16 we've identified that Omar Hammami was the person who the
17 defendant was sending his salaams to, to Daniel Maldonado,
18 because he knew he was there with him.

19 Evidence of another person, which we're hearing for
01:05 20 the first time today, is not within the ken of the government's
21 information. We've produced a telephone call -- a recording of
22 the telephone call, as well as the transcript now of the
23 telephone call, depicting the parties on the telephone call,
24 depicting the overheard voice of Omar Hammami who, just for
25 your Honor's benefit, was designated last week as a specially

1 designated terrorist by the Treasury Department, which is just
2 as a point of suggesting he is not going to be a cooperating
3 witness of the government in this case.

4 There's no more that we have that we can say about
5 this, you know, mysterious third person which -- fourth person,
6 I should say, that the defense is asking for at this point.

7 THE COURT: So let me just be clear on that. Does the
8 government believe there was a fourth person?

9 MR. CHAKRAVARTY: The government is not aware that
01:06 10 there ever was a fourth person. This is the first time we're
11 hearing about it today.

12 THE COURT: The government's position is if there
13 were, it doesn't know?

14 MR. CHAKRAVARTY: Correct. That's more precise, your
15 Honor. We weren't in Somalia; we don't know who else...

16 THE COURT: So that -- I'm just trying to understand
17 exactly where everybody is on this. It's not necessarily the
18 government's position because I guess it doesn't get to that
19 point, that it does not have to tell, if it knew.

01:06 20 MR. CHAKRAVARTY: Correct. We're not --

21 THE COURT: The factual premise is lacking, is what
22 you're saying.

23 MR. CHAKRAVARTY: Right. To the extent that -- yes,
24 that's correct, your Honor.

25 THE COURT: So if the government were to discover that

1 there was a fourth person and who it was, the government will
2 concede that it would be disclosable as Hammami was disclosed?

3 MR. CHAKRAVARTY: No, we don't go that far, your
4 Honor. But that being said -- that being said --

5 THE COURT: It's a baby step.

6 MR. CARNEY: A little cross-examination never hurts
7 the oral argument.

8 MR. CHAKRAVARTY: It depends on the context -- I mean,
9 we're talking really an attenuated hypothetical here. Right
01:07 10 now we don't know if there was another person there. To the
11 extent we have an obligation to find out whether there was
12 another person there and the identity of another person somehow
13 is exculpatory, I'm not sure we would concede that. That being
14 said, I don't see --

15 THE COURT: No, my question wasn't whether you had to
16 go find out, my question is whether you learned.

17 MR. CHAKRAVARTY: I wouldn't go so far as to say we
18 should be obligated to do that, but unless there's a reason not
19 to produce that name, we would produce that name.

01:07 20 THE COURT: Okay. You just want to reserve a
21 footnote?

22 MR. CHAKRAVARTY: Yes.

23 THE COURT: And let me come back to Number 2 -- I'm
24 sorry, not Number 2 -- Number 4, which is that a similar
25 situation that your position -- I guess maybe again you're

1 being cautious, you don't reach whether you would have to
2 disclose it as exculpatory; your position is the facts are not
3 true and, therefore, there is nothing to be disclosed, is
4 that --

5 MR. CHAKRAVARTY: That is exactly right, your Honor.

6 MR. CARNEY: Let me make my request as specific as I
7 can in each of these areas. In regard to an exculpatory
8 negative, what I'm referring to is if the government searches
9 for something specifically --

01:08 10 THE COURT: You're talking about 2 and 3 now?

11 MR. CARNEY: Yes, I am, your Honor.

12 If the government searches for something specific and
13 doesn't find it, I consider that exculpatory. I'm not asking
14 them to do a search today. I'm not asking them to do anything
15 that they haven't already done. It's the equivalent of this:
16 Let's say in a murder case a crime-scene team goes into the
17 house. One of them is looking for fingerprints, and he dusts
18 the entire house and does not find any fingerprints. I would
19 say that's a fact that the defense is entitled to know because
01:09 20 the defense would be in a position to argue that they did not
21 find the defendant's fingerprints at the scene.

22 In this instance if the government tried to determine
23 if there were military training camps in Yemen and asked some
24 of the allied investigative agencies like the NSA whether they
25 have any information that there were military training camps in

1 Yemen in 2004, and the response they get back is, "No, to the
2 best of our knowledge there were no training camps in Yemen in
3 2004," we would consider that exculpatory.

4 The government does not consider it exculpatory, and
5 that's why I'm pressing that if a specific search were done and
6 it came up negative in these two areas, we'd like to know that
7 it did come up negative. All we would need to know is the one
8 word: "We made the search and the answer is, no, we found no
9 evidence of a military training camp in Yemen in 2004."

01:10 10 THE COURT: When you use the term "government
11 investigation," are you referring to the criminal
12 investigation?

13 MR. CARNEY: Yes, I am, your Honor.

14 THE COURT: So you're not inquiring whether unrelated
15 to the criminal investigation or this prosecution some agency
16 of the government, including perhaps the military, sought or
17 required information on the existence of camps in Yemen, for
18 example?

19 MR. CARNEY: No, I'm not, your Honor.

01:10 20 THE COURT: You're asking whether someone connected
21 with this investigation made that effort.

22 MR. CARNEY: Yes, your Honor.

23 THE COURT: Is that the way you've understood it? We
24 had this discussion generally I think once before.

25 MR. CHAKRAVARTY: We did.

1 THE COURT: And I thought it was couched in terms of
2 the entire government. This is a little bit narrower than I
3 had focused on it before.

4 MR. CARNEY: Your Honor's correct.

5 MR. CHAKRAVARTY: Even if that were the case, your
6 Honor, I think what's operative here is -- maybe kind of to
7 elaborate a little bit more, or kind of reiterate, I guess, why
8 we think that as a -- as a matter of relevance why we don't
9 think it's --

01:11 10 THE COURT: I understand that argument. That's a
11 different argument.

12 MR. CHAKRAVARTY: But in terms of the focus of the
13 search, if the government -- again, I reiterate that that's not
14 how the government operates. And I can assure -- maybe this
15 will take the issue off the table. The government -- the
16 prosecution team has not asked whether there were any terrorist
17 training camps in Mehanna [sic] at the time that he was alleged
18 to have visited because it's irrelevant, arguably, to the
19 indictment.

01:12 20 THE COURT: Well, I understand the
21 relevance/materiality aspect of it. I'm just trying to focus
22 on the other -- in a sense -- well, one -- I agree with
23 Mr. Carney on the fingerprint example. That could be
24 characterized as a scientific experiment or something of that
25 sort. It was different from a general investigation.

1 Are you aware of any cases where the kind of
2 non-information that you're referring to here has been required
3 to be disclosed?

4 MR. CARNEY: It's usually in the context of where the
5 government investigators look for something, they don't find
6 it. And the Court has held that absence of corroboration is
7 viewed broadly as exculpatory.

8 THE COURT: I guess the problem I have is that there
9 can be a wide spectrum of "look for something." There can be a
01:13 10 specific scientific test; there can be a general scene
11 examination; there can be the scope of the entire four-year
12 investigation. And the broader it gets, the harder it is, it
13 seems to me, to characterize that as "look for something."
14 You're investigating. Generally you want to learn as much as
15 you can about circumstances. I think at that end of the
16 spectrum there's no requirement to disclose. At the other end,
17 the more specific the test or inquiry, there is.

18 So I guess for now, anyway, I'm inclined to think that
19 it's not discoverable. It doesn't fit closely enough to the
01:14 20 analogy that you, yourself, raised. So I think as to that for
21 now it will be denied. As to 4 and 5, I accept the
22 representations until they're contradicted that the factual
23 predicate is inadequate.

24 MR. CARNEY: I would accept their representations. I
25 just wondered if I could narrow it down even more. As I listen

1 to Mr. Chakravarty, he said he's unaware of any instance where
2 this happened after the defendant was initially indicted. I'd
3 like to know if any representative of a counterterrorism
4 agency, specifically in New York, sent someone to meet with
5 Mr. Mehanna to try to engage him in terrorist-related
6 activities and Mr. Mehanna declined.

7 So I'm narrowing it down to a government organization
8 in New York with a counterterrorism unit sending a person to
9 meet with my client before he was indicted and my client
01:15 10 rejecting the offer. And I'll be further specific that an
11 individual then traveled from New York and met with people here
12 in Boston to explain what was going on from their end.

13 If that happened and my client was approached by
14 either an undercover agent or a cooperating witness and asked
15 to engage in a crime of violence or any other crime related to
16 terrorism and he said, "No, I'm not interested in doing that,"
17 I believe that's exculpatory. That's as specific as I can get
18 with the one exception of giving you the name of the person who
19 came from New York --

01:16 20 THE COURT: Right.

21 MR. CARNEY: -- to Boston. I'm not trying to
22 embarrass anybody.

23 THE COURT: Okay.

24 MR. CHAKRAVARTY: Again, I mean, regardless of the
25 timing, it seems like the operative facts here are that the

1 defendant was pitched to engage in an act of terrorism and he
2 apparently declined. Shouldn't the defendant be the person
3 best situated to be able to represent those facts instead of
4 having the government go canvas, you know, various
5 counterterrorism agencies which are not involved with this
6 investigation? It seems like they have not met merely the
7 factual predicate to necessitate the government to go on some
8 fishing expedition.

9 All that being said, the government having looked into
01:16 10 the defendant's request, does not have any information that
11 would reflect those facts at all.

12 THE COURT: Without the qualification "after
13 indictment"?

14 MR. CHAKRAVARTY: Yes, your Honor. And that being
15 said, the government is not omniscient; the government does not
16 know -- you know, to borrow the phrase of a former defense
17 secretary, it doesn't know what it doesn't know. To the
18 government's knowledge, having done due diligence in terms of
19 determining whether such contact occurred, we are not aware of
01:17 20 any such contact.

21 MR. CARNEY: So I assume the government is saying that
22 no representative of the New York City Police Counterterrorism
23 Unit, in fact, the head of the counterterrorism unit, did not
24 come here and meet with senior people in the U.S. Attorney's
25 Office in Boston to discuss their sending someone to meet with

1 Tarek Mehanna and pitch radical ideas to him of jihad and
2 otherwise, and apologize for sending someone from New York to
3 this district to make that contact? If that's what the
4 government is saying, then I'll accept it.

5 MR. CHAKRAVARTY: That's not what the government is
6 saying. Neither is the government -- should the government be
7 compelled to talk about something that is -- would not be
8 exculpatory in any sense.

9 MR. CARNEY: See, the problem I have, your Honor,
01:18 10 frankly, is when I have this discussion with the government,
11 and Attorney Auerhahn and I batted it back and forth for 30
12 minutes, I couldn't get beyond an acknowledgment that this
13 could be exculpatory evidence. And where Mr. Chakravarty again
14 says, you know, they don't have to go searching all over and
15 this isn't exculpatory evidence, I suggest the seventh floor of
16 this building is the pond where they go fishing.

17 THE COURT: Yeah. Okay. I think we'll explore this
18 further in camera with both counsel.

19 So I think that leaves Number 4 unresolved. Number 1,
01:19 20 I guess, is in progress, and we'll monitor the progress of
21 Number 1. Two and 3 are denied, and 5 is denied on the
22 government's representation regarding the presence of another
23 person in Somalia. Okay. Let's -- so I think that disposes of
24 the motion except for this last matter.

25 How about a general overview now of where trial

1 preparation materials stand, and so on? We've heard now about
2 witness statements being provided, and so on. Where do we
3 stand with respect to this?

4 MR. CHAKRAVARTY: So these witness statements
5 hopefully will be provided. We plan to do it in a rolling
6 fashion. There are a number of administrative hoops that the
7 prosecution has to go through to be able to produce them, which
8 we're undergoing, and then to digitize them and put them on CDs
9 and get them over to the defense. But we are working on that,
01:20 10 and I think every week our hope is that we'll be able to be
11 making more progress so that close to the end of this month we
12 shall have, if not all, then the vast majority of materials
13 which we feel that we need to produce either under *Jencks* or
14 *Giglio* have been produced.

15 We have made contact at your Honor's suggestion with
16 the tech people in light of the trial presentation system, the
17 JERS system that your Honor uses.

18 THE COURT: Do you both know about that?

19 MR. CARNEY: Yes, your Honor.

01:20 20 THE COURT: Okay. We're using it for the first time
21 in the trial that's ongoing.

22 MR. CHAKRAVARTY: I'll confer with our office to see
23 if there are any issues we need to work on.

24 The government has given notice of expert disclosures
25 but has not elaborated on full and complete 702 and 703

1 disclosures which, again, the government intends to do both
2 through an expert report for substantive experts on terrorism
3 and on radicalization and significance of certain things.

4 THE COURT: That's by correspondence?

5 MR. CHAKRAVARTY: That's by correspondence.

6 THE COURT: Could I have a copy of that?

7 MR. CHAKRAVARTY: I would be happy to copy you on
8 that, your Honor.

9 To the extent we don't have the final report, you
01:21 10 know, in the next couple of weeks, then we can give a summary
11 by attorney letter so that the defense is more prepared than
12 they are even now. Although they have some idea, we could give
13 them a better idea. And our hope is, as with all discovery, to
14 further narrow, further identify exhibits.

15 We've gotten -- we've started to identify the universe
16 of the discovery materials that we intend to use as --
17 presently intend to use as exhibits. Some we had noticed to
18 defense a couple of months ago, but the real cumbersome ones
19 are the computer files that are on a computer, the actual path
01:22 20 name of each individual file that we intend to offer. That's
21 taking some logistics. It's taking some work with computer
22 forensic examiners. We've got the first kind of response to a
23 first salvo of those files which I received today and I'll turn
24 over to the defense. I'll be able to e-mail that to them later
25 this week, if not tonight.

1 So in short, we hope that by 21 days -- you know, I'll
2 give myself a week or two leeway, 21 days -- we should have an
3 ultimate exhibit list, witness list, and the rest of the
4 discovery will be done, you know, subject to modifications as
5 we get closer to trial.

6 MR. CARNEY: I'd just like to comment on one aspect of
7 that, your Honor. I would encourage the Court to ask the
8 government to give us their notice regarding the substance of
9 expert testimony as soon as they can. Because we have not been
01:23 10 provided that up to now, we've got a lot of balls in the air,
11 if I could put it that way, with more being tossed up. And
12 what we're trying to do, in part, is anticipate what the
13 government experts will say and then have someone who can speak
14 on the same subject matter.

15 The longer it takes for us to get what the
16 government's expert is going to say in this case, or experts
17 are going to say, the longer it's going to take us to identify
18 people that we would want to offer in rebuttal.

19 THE COURT: Well, okay. Mr. Chakravarty just
01:23 20 mentioned 21 days. That's -- three weeks from today would be
21 August 24th. If we set that as a deadline, is that enough? Do
22 you want to squeeze in more?

23 MR. CARNEY: No. Well, if I could, yes.

24 MR. CHAKRAVARTY: Your Honor, we can respond with a
25 summary in attorney words as to what their testimony is going

1 to be before that, your Honor.

2 MR. CARNEY: That would be helpful.

3 THE COURT: That would be fine.

4 MR. CARNEY: And then in 21 days, if the government
5 could ask their expert to present the final report within
6 this -- at the end of this 21 days, then that allows us to
7 immediately start narrowing down who we need and give notice.

8 THE COURT: Right. But I think an intelligible
9 summary, in lay terms, would be very helpful because then, at
01:24 10 least, the fields of expertise could be appropriately
11 appreciated, and so on. And even if the actual expert reports
12 weren't yet seen, that could advance the process of getting
13 defense experts prepared, so...

14 MR. CARNEY: Also, in fairness, it will ensure that
15 the government gets notice of our experts at the earliest
16 opportunity as well.

17 THE COURT: Okay. So I'm looking for a conference
18 date, and I'd like to do it the first week of September, right
19 after Labor Day, if we could, just to take stock of where
01:25 20 everything is.

21 MR. CHAKRAVARTY: Not a final pretrial, just a status?

22 THE COURT: Just a status.

23 MR. CARNEY: Does your Honor have a suggested --

24 THE COURT: Well, I'm looking at the 7th. Wednesday,
25 the 7th, about three o'clock.

1 MR. CARNEY: That's good for the defense, your Honor.
2 Thank you.

3 THE CLERK: So we'll set up a status on Wednesday,
4 September 7th, at 3 p.m.

5 MR. CARNEY: I also have four housekeeping motions
6 that we'd like to --

7 THE COURT: Yes. I want to talk to you about those.
8 That's on my agenda after this hearing is concluded.

9 MR. CARNEY: Yes, your Honor.

01:25 10 THE COURT: I would like to see counsel on both
11 sides -- we'll adjourn the hearing, but I would like to
12 continue the discussion about the last motion briefly, probably
13 in chambers, and then we could take up those other matters.

14 MR. CARNEY: Thank you, your Honor.

15 THE COURT: Okay? So we'll be in recess.

16 THE CLERK: All rise. Court is in recess.

17 (The Court exits the courtroom and the proceedings
18 concluded at 3:28 p.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 09-10017-GAO, United States of America v. Tarek Mehanna.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: August 10, 2011